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Supreme Court, U.S.
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NO. 96-638

In the Supreme Court of the United States
October Term, 1996

DWAINE GANYO,
Petitioner,

v.

SEGUIN INDEPENDENT SCHOOL DISTRICT, JAMES LEHMAN, MILTON WITT, TIMOTHY FOX, NANCY EWALD, BILL FENNELL, RAY SIMICEK, AND LIONEL (SKIP) MENO, TEXAS COMMISSIONER OF EDUCATION,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION BY RESPONDENTS SEGUIN INDEPENDENT SCHOOL DISTRICT, LEHMAN, WITT, FOX, EWALD, FENNELL, AND SIMICEK

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35 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly concluded that Petitioner Ganyo failed to show reversible error in his appeal from an adverse summary judgment.

2. Whether the courts below properly applied Supreme Court First Amendment precedent in the context of a public employee whose employment was terminated when he repeatedly refused to provide his employer a written assurance that he would perform the lawful and reasonable job assignment for which he was hired, after the employee's acknowledged failure to perform his job assignment had placed his employer in violation of federal law.

3. Whether Petitioner Ganyo's claim under the Rehabilitation Act correctly was decided against him, either because he lacked standing or for other independent reasons.

LIST OF PARTIES

The parties to this case are:

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(2) Respondents:

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STATEMENT OF THE CASE

Petitioner Ganyo filed suit arising out of the termination of his employment by the Seguin Independent School District (hereafter, the "School District" or "SISD"). In federal court, Ganyo named as defendants: (1) the School District; two SISD administrators, Superintendent James Lehman and Principal Milton Witt; and, four members of the SISD Board of Trustees, Timothy Fox, Nancy Ewald, Bill Fennell, and Ray Simicek (collectively, the "School District Respondents"); and (2) Lionel Meno, the Texas Commissioner of Education. Ganyo raised causes of action against the School District Respondents under both the First Amendment and the Rehabilitation Act.

A Magistrate Judge initially considered the motion for summary judgment filed by the School District Respondents. The Magistrate Judge issued a lengthy memorandum and recommended that summary judgment be granted against Ganyo on his causes under the First Amendment and the Rehabilitation Act (Pet. App. at 9-28). The district court, after conducting a de novo review, accepted the memorandum and recommendation of the Magistrate Judge and granted summary judgment in favor of the School District Respondents (Pet. App. at 4-8). In an unpublished opinion, the Fifth Circuit Court of Appeals found that Ganyo presented no reversible error on appeal and affirmed the judgment of the district court (Pet. App. at 1-2).

The School District Respondents respectfully oppose Ganyo's Petition for Writ of Certiorari. The Petition repeatedly misstates both fact and law. Pursuant to United States Supreme Court Rule 15.1, the School District Respondents bring the following misstatements to the attention of the Court.

A. GANYO'S PETITION MISSTATES, OR FAILS FULLY TO STATE, THE DISPOSITION OF HIS CAUSES OF ACTION BY THE COURTS BELOW

When addressing the "nature of the case," Ganyo's Petition misstates, or fails fully to state, the disposition of his causes of action by the courts below (Petition at 6).

(1) GANYO MISSTATES THE DISPOSITION OF HIS CAUSE OF ACTION UNDER THE FIRST AMENDMENT

Regarding his First Amendment cause of action, Ganyo erroneously states that "[t]he lower courts have failed to address Petitioner's right to refuse to speak" (Petition at 6). Contrary to Ganyo's assertion, the Magistrate Judge fully addressed Ganyo's "refusal to speak" in the context of the employer-employee relationship of this case. Ganyo's "refusal to speak" occurred when (1) the School District reasonably required an assurance from Ganyo that he would do the job for which he had been hired, because his acknowledged failure to do his job had placed SISD in violation of federal regulations concerning the education of disabled students, and (2) Ganyo refused to sign a letter of assurance that he would do his job and provide the instruction required by his disabled students.

Ganyo's assertion that the lower courts failed to address his "refusal to speak" is belied by the memorandum and recommendation of the Magistrate Judge. The Magistrate Judge detailed the summary judgment evidence concerning Ganyo's refusal to sign the letter of assurance requested by SISD (Pet. App. at 10-12, 18-23). The evidence established that Ganyo's refusal to provide the letter of assurance (i.e., his "refusal to speak") (1) "directly affected both [Ganyo's] specific duties and the school district's mission in educating its

children," (2) threatened the School District with "losing its accreditation from the state," and (3) "had a direct and substantial impact on the ability of the school district to carry out its educational mission" (Pet. App. at 21-22). The Magistrate Judge expressly concluded:

> [Ganyo's] speech interests, including his 'refusal to speak', are outweighed by the school district's interests in efficient education.

(Emphasis added.)(Pet. App. at 23). In turn, the district court accepted the memorandum and recommendation of the Magistrate Judge and granted summary judgment, and the Fifth Circuit affirmed that summary judgment.

The courts below explicitly addressed Ganyo's First Amendment cause of action based upon a refusal to speak. For Ganyo now to claim that "[t]he lower courts have failed to address Petitioner's right to refuse to speak" (Petition at 6), wholly misstates the disposition of his First Amendment cause of action by the courts below.

(2) GANYO MISREPRESENTS THE DISPOSITION OF HIS CAUSE OF ACTION UNDER THE REHABILITATION ACT

Regarding his Rehabilitation Act cause of action, Ganyo misrepresents the disposition of that cause by the Fifth Circuit Court of Appeals. Ganyo erroneously states that "the Court of Appeals left standing the Magistrate Judge's ruling that Dr. Ganyo has no standing to sue under the Rehabilitation Act because he himself is not disabled." (Petition at 6). To the contrary, the Fifth Circuit simply found that Ganyo presented "no reversible error" on appeal (Pet. App. at 2).

In the Court of Appeals, the School District Respondents raised and argued in their brief three, separate, independent bases upon which the Fifth Circuit could affirm the summary judgment against Ganyo on his claim under the Rehabilitation Act. Only the first of those three bases asserted that Ganyo lacked standing under the Rehabilitation Act. *Alternatively*, the School District Respondents asserted that even if Ganyo had third-party standing under the Act, his claim failed either because (1) in all of Ganyo's complaints, he complained of actions taken against *him*, not against his disabled students, *or* (2) the summary judgment evidence established that the decision to terminate Ganyo's employment was based upon his refusal to provide the requested letter of assurance and was not based upon retaliation for his filing of complaints.

Ganyo misrepresents the disposition of his cause of action with his erroneous statement that "the Court of Appeals left standing the Magistrate Judge's ruling that Dr. Ganyo has no standing to sue under the Rehabilitation Act" (Petition at 6). To the contrary, the Fifth Circuit could have concluded that Ganyo presented "no reversible error" even if he had standing to sue, because summary judgment under the Rehabilitation Act was proper based upon one of the independent alternative grounds raised and argued by the School District Respondents.

B. GANYO'S PETITION MISSTATES FACTS AND ATTEMPTS SELECTIVELY TO OMIT OTHER PERTINENT FACTS

The memorandum and recommendation of the Magistrate Judge correctly states the facts established by the summary judgment evidence (Pet. App. at 9-28). Ganyo's statement of the "Facts of the Case," as contained in his Petition, selectively omits pertinent facts established by the

evidence and affirmatively misstates other facts (Petition at 6-9). As contained in the Record ("R") on appeal before the Fifth Circuit, the facts are as follows:

Dwaine Ganyo was employed by the Seguin Independent School District as a special education teacher for the 1991-92 school year to teach students with disabilities (R. at 389). For the first semester of the 1991-92 school year, Ganyo was assigned to teach "content mastery" to 31 disabled students (R. at 389).

"Content mastery" is a program for teaching students with disabilities (R. at 389, 600). The disabled students take regular subjects from regular education teachers, but they go to the content mastery room for additional assistance in particular subjects from the special education teacher (R. at 389).

At the end of the first semester when 8 of the 31 students were not successful under the content mastery program and were failing, meetings of the students' Admission, Review and Dismissal (ARD) committees were held to review the Individual Education Plans (IEPs) of those students (R. at 600). In order to ensure a disabled student's right to free appropriate public education, the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq.*, mandates that an IEP be developed and implemented for each child.[1] The IEP is a

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1. The Fifth Circuit recently described the process in Texas as follows:

> The Individuals with Disabilities Education Act requires states to provide disabled children with a "free appropriate public education" in return for acceptance of federal funds. The student's curriculum is uniquely tailored to the individual student through the annual implementation of an "individualized education

written statement for each disabled student that must include (1) the present levels of educational performance of the child, (2) the annual goals, including short-term instructional objectives, (3) the specific educational services to be provided, (4) the projected date for initiation and anticipated duration of services, and (5) evaluation procedures for determining whether the instructional objectives are being met. 20 U.S.C. § 1401(a)(20).

The ARD committees for the 8 students met to review the students' IEPs and determine their instructional needs (R. at 600). Ganyo attended the committee meetings, as did the parents of the students, and all agreed that the students needed instruction in a "resource classroom" rather than pursuant to the content mastery program (R. at 600).

A "resource class" is a special education class where a student with disabilities receives all of his or her instruction in a particular subject from the special education teacher for a full period (R. at 389).

During the second semester of the 1991-92 school year, Ganyo was assigned to teach resource classes as well as content mastery, i.e., a dual assignment (R. at 390). Such a dual teaching assignment, like Ganyo's, is a common arrangement in

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> program" or "IEP." The IEP is produced by a qualified representative of the local education agency, the child's teacher, the child's parents or guardian, other individuals at the discretion of the agency or the parent, and where appropriate, the child. In Texas, this is called the Admission, Review, and Dismissal (ARD) committee.

(Footnotes omitted.) *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 690-91 (5th Cir. 1996).

Texas school districts (R. at 418, 451, 600). Ganyo would not have had a teaching load large enough for a full time teacher if he were to teach either (1) only the 8 resource class students, or (2) only the remaining 23 content mastery students (R. at 600). However, the combined dual teaching assignment gave Ganyo a "light" full time load when compared to other special education teachers in the School District (R. at 600). Ganyo also had a full time aide to assist him with the dual assignment, something not available to other SISD special education teachers who had considerably heavier teaching loads (R. at 600).

By letter dated March 9, 1992, Ganyo complained to the Texas Education Agency ("TEA") about his dual teaching assignments (R. at 396). In his complaint, Ganyo stated that he was "unable to carry out the IEPs" of his disabled students because of the dual assignments (R. at 396). In the letter, Ganyo also expressed a fear that unless the situation was corrected, students with disabilities could fail (R. at 396).

TEA responded to Ganyo by letter dated March 20, 1992 (R. at 453). TEA's letter to Ganyo included the following:

> The [content mastery and resource] teaching assignment that you describe does not violate any rule or regulation for which this Agency has responsibility. In fact, this arrangement, as you describe it, does not appear to be unreasonable or unmanageable.
>
> In your letter, you state that your inability prevents you from carrying out the IEPs. The district staff verify that you are not implementing the IEPs.

Position of the Texas Education Agency
Authority: 34 C.F.R. 300.342(b)

> Due to your failure to implement the IEPs of the students, the district is in violation of federal regulations. Due to the serious nature of this issue, immediate corrective action will be required of the district.

(R. at 453).

By separate letter also dated March 20, 1992, TEA wrote the Superintendent of the School District regarding Ganyo's failure to implement the IEPs of his students (R. at 455). TEA informed the District of the necessary corrective action:

> Within two weeks of the date on this letter, submit documentation to show that the district has taken immediate action to provide these students the services that are outlined on their IEPs.

(R. at 455).

In other words, two so-called violations were raised by Ganyo's March 9th complaint to the Texas Education Agency. (1) TEA did not find any violation concerning Ganyo's teaching assignments. The evidence established that the dual assignment about which Ganyo complained was a common practice (R. at 418, 451), which TEA found violated no rule and was neither unreasonable nor unmanageable (R. at 319, 453). (2) Nevertheless, TEA did find a violation based on Ganyo's complaint. The violation TEA found as a result of Ganyo's complaint, however, was that Ganyo, himself, was failing to

implement the IEPs of his students, which, in turn placed the School District in violation of 34 C.F.R. § 300.342 (R. at 318-20, 455).

In response to TEA's finding of non-compliance by the School District due to Ganyo's failures, the District then sought Ganyo's assurance that he would provide the needed instruction to his students as required by their IEPs, but Ganyo refused to provide any such assurance (R. at 400). For example, a conference was held by SISD administrators with Ganyo on Friday, March 27, 1992. As a memorandum concerning that conference reflects, at the conference (1) the District attempted to respond to the "immediate action" TEA demanded, (2) Ganyo was directed to provide the requested assurance to TEA, and (3) Ganyo refused to provide the requested assurance and wanted "to discuss the situation on Monday." (R. at 398). By the date of the Friday conference, of course, the district had only one week to provide TEA with documentation showing that it indeed had taken immediate action to correct Ganyo's failure to implement the IEPs of his students and to provide the students the services their IEPs required (R. at 455). The conference memorandum reflected that there was an "urgency" requiring the assurance from Ganyo (R. at 398). The urgency of a timely response to TEA and the possibility of sanctions against the District were explained to Ganyo (R. at 317).

Ganyo misstates the facts established in the Record. Ganyo erroneously states that "Respondents' only assertion of 'disruption' resulting from Dr. Ganyo's refusal to sign the assurance was 'because without this assurance, TEA was threatening to sanction the school district.'" (Petition at 19). To the contrary, Ganyo's refusal to provide the requested assurance disrupted and threatened the District's ability to comply with federal law and to provide appropriate education to his special education students. The School District was in

violation of federal regulations "[d]ue to [Ganyo's] failure to implement the IEPs of [his] students." (R. at 453). Ganyo's refusal to provide the requested assurance disrupted and threatened the efficient operations of the District. "[I]t jeopardized the District's accreditation with TEA" (R. at 315). "[I]t threatened to have accreditation of [SISD's] education program suspended by TEA" (R. at 317). "[I]t required replacing Dr. Ganyo with a teacher who would perform his job duties to the satisfaction of TEA" (R. at 317). In order to ensure the educational integrity of its special education program, the District would have to "replace [Ganyo] with someone who would agree to teach school children as required by state law and enforced by TEA" during the middle of the school semester (R. at 322).

The School District attempted to persuade Ganyo to comply with administrative directives regarding his assignment and to provide the assurance to the TEA, but he did not work with the content mastery students as directed or sign any assurance. (R. at 401, 415, 446-47).

On April 3, 1992, the Superintendent recommended that Ganyo's employment be terminated because of his failure to comply with administrative directives that Ganyo provide the requested assurance to TEA that he would provide the needed instruction to carry out the IEPs of the disabled students assigned to him (R. at 402). Prior to his termination, Ganyo was afforded an evidentiary hearing before the school board (R. at 404-640). The decision of the SISD school board members to terminate Ganyo's employment was based upon a finding of Ganyo's refusal to follow administrative directives in providing the assurance requested of him and was not based upon his complaints (R. at 327-38).

REASONS FOR DENYING THE PETITION

A. GANYO SEEKS REVIEW OF AN UNPUBLISHED DECISION WHICH FOUND ONLY THAT HE PRESENTED "NO REVERSIBLE ERROR" ON APPEAL

Ganyo's Petition presents the Supreme Court with a case that will not affect other potential litigants. The unpublished Fifth Circuit opinion establishes no precedent for other litigants, even under the local rules of that Court. The sum and substance of the two paragraph, per curiam opinion was simply the following: (1) Ganyo contended on appeal that the district court erred in granting a summary judgment against him on the various causes of action that he had raised, yet (2) the Court of Appeals found only that he had presented "no reversible error." (Pet. App. at 1-2).

The Fifth Circuit's Local Rule 47.5.1 provides that "opinions that may in any way interest persons other than the parties to a case should be published" and sets forth the criteria for publication. The Court of Appeals' opinion was not published and does not in any way interest persons other than Ganyo and the numerous parties he sued. In a footnote to its opinion, the Fifth Circuit included its standard legend, as mandated by Local Rule 47.5.4 of that Court, concerning unpublished opinions:

> Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

(Pet. App. at 1-2). Even under the limited circumstances set

forth in the local rules of the Fifth Circuit, an unpublished opinion which simply states that "no reversible error" has been presented on appeal will not serve as precedential value for any court.

The present case was decided by summary judgment, turned upon its own narrow set of facts, and would affect few persons other than the instant litigants even if any of the lower courts had published their opinions. In effect, Ganyo presents the uniquely absurd argument that because he was a "whistleblower" who blew the whistle on his own job performance, the First Amendment should shield him from being required to acknowledge that he will perform the job for which he was hired. Ganyo's arguments stand the very concept of whistleblowing on its head, giving protection to a person who commits a wrong because that very person blows the whistle on himself.

Ganyo's Petition seeks review of an unpublished opinion that contains no precedential value and which simply attempts to ignore the narrowly drawn focus presented by the facts and arguments of this case. The Petition fails to present any matter of overriding national importance to the Court for review. The writ of certiorari should be denied.

B. GANYO ENGAGES IN A FLAWED ANALYSIS OF THE PROTECTED NATURE OF HIS SPEECH UNDER THE FIRST AMENDMENT, WHEN HE ATTEMPTS TO IGNORE THE EMPLOYER-EMPLOYEE CONTEXT IN WHICH THE SPEECH AROSE

When addressing his First Amendment freedom of speech claim, Ganyo asserts that the courts below "entirely

misevaluated" the protected nature of his speech (Petition at 14). To the contrary, it is Ganyo, not the courts below, who fails properly to evaluate the First Amendment protection afforded public employees under the precedent of this Court. Ganyo erroneously attempts to wrap his arguments around speech cases that are not applicable to the present case. Ganyo's Petition is founded upon a fundamental analytical flaw that is repeated throughout the Petition. Ganyo's arguments fail to distinguish between (1) cases in which the state (or one of its political subdivisions) acts in its role as a sovereign, and (2) cases in which the state acts in its role as an employer.

The distinction is critical, because "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). "[T]he government as employer indeed has far broader powers than the government as sovereign." *Waters v. Churchill*, ___ U.S. ___, 114 S.Ct 1878, 1886, 128 L.Ed.2d 686 (1994)(O'Connor, J., plurality opinion).

In the present case, it is undisputed that the School District Respondents were acting in their role as employer when Ganyo's employment was terminated. As the Magistrate Judge noted, the present case cannot be divorced from the context of the employer-employee relationship:

> If every teacher were allowed to determine whether his work assignment was appropriate, and then refuse to carry out that assignment when he determined in his opinion that the assignment was excessive or otherwise inappropriate, the ability of a school district to

> effectively carry out its educational mission would be divested. [Ganyo] was free to continue to speak out regarding the appropriateness of his assignment; he was not free to disregard his employer's directives so as to do what he perceived to be his job in the manner in which he felt it ought to be done.

(Pet. App. at 22).

The present case does not involve the role of the School District Respondents in their exercise of sovereign powers. Nevertheless, the vast majority of the First Amendment cases relied upon by Ganyo and cited in his Petition precisely involve the role of the state as sovereign. *See, e.g., West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)(state law compelling students to salute the flag); *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989)(application of flag burning to a state law criminalizing the desecration of venerated objects); *Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988)(state law requiring professional fundraisers to make certain disclosures to potential charitable donors); *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977)(state statute criminalizing the act of obscuring the state motto, "Live Free or Die," on automobile license plates); *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)(application of a state unemployment compensation law to persons engaging in the sacramental use of prohibited drugs); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d. 305 (1992)(city 'hate crimes' ordinance criminalizing cross-burning based on race).

Instead of involving the power of the sovereign, the present case involves the employer-employee relationship between the School District Respondents and Ganyo. The School District was charged by law with ensuring that its disabled students would be educated according to the requirements of their Individual Education Plans, and SISD hired Ganyo to help perform that task. "[C]onstitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign." *Waters*, ___ U. S. at ___, 114 S.Ct. at 1887. As articulated by Justice O'Connor:

> [T]he extra power the government has in this area comes from the nature of the government's mission as employer. Governmental agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. ...
>
> The key to the First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Id., ___ U.S. ___, 114 S.Ct. at 1887-88.

Ganyo's Petition refuses to acknowledge the difference

in the speech cases between the state's role as sovereign and the state's role as employer. In its role as employer, the state has far broader powers and its interests in achieving its goals are elevated to a significant level.

As this Court has stated, "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick v. Myers*, 461 U.S. 138, 149, 103 S.Ct. 1684, 1691, 75 L.Ed.2d 708 (1982). Nevertheless, Ganyo asserts that "*Connick v. Myers* is inapplicable to this case" (Petition at 13). Even the dissenting opinion in *Connick*, like the majority opinion, drew a line beyond which an employee's refusal to cooperate with his employer is unprotected:

> Perhaps the simplest example of a statement by a public employee that would not be protected by the First Amendment would be answering "No" to a request that the employee perform a lawful task within the scope of his duties. Although such a refusal is "speech," which implicates First Amendment interests, it is also insubordination, and as such it may serve as the basis for a lawful dismissal.

(Emphasis added.) *Id.*, 461 U.S. at 163, n. 3, 103 S.Ct. at 1699, n. 3 (Brennan, J. dissenting). *See also, MacAdams v. Matagorda County Appraisal District*, 798 F.2d 842, 845 (5th Cir. 1986)(public employee properly terminated for his refusal to "cooperate with or follow the biddings of his employers"); *Berry v. Bailey* 726 F.2d 670, 676 (11th Cir. 1984)(deputy sheriff properly terminated when he "flatly refused" to follow the lawful request of his supervisor).

This Court cannot ignore, as Ganyo would have it, the context of the employer-employee relationship. The present case is not about forcing the public to adhere to ideological points of view or prescribing what is to be the orthodox view in matters of opinion in areas of public import. Instead, the present case is about a public employer's right to secure from one of its employees the assurance that he will carry out his job assignments so as to avoid sanctions being imposed upon the employer by a higher authority. The School District did not seek to coerce an expression of opinion from Ganyo; it sought to obtain his assurance that he would do his job as assigned. Ganyo refused to provide any such assurance.

Ganyo was given a teaching assignment that required him to provide content mastery and resource instruction to disabled students in the same setting. Ganyo came to the conclusion that he could not do so and complained to the Texas Education Agency, despite the facts that (1) he was assisted by a full-time aide in the classroom, and (2) such a dual assignment was a common practice. TEA concluded that the assignment was neither unlawful nor inappropriate, and that Ganyo's failure to implement his students' IEPs was a very serious matter requiring immediate corrective action on the part of the School District. The School District gave Ganyo the opportunity, not just once but on several occasions, to provide assurances that he would follow District directives concerning his teaching assignment and provide the needed instruction to his students. His refusal to do so was in effect a refusal to carry out his duties as assigned. Under his contract of employment, Ganyo was subject to dismissal for not complying with administrative directives.

When addressing his First Amendment freedom of speech claims, Ganyo's Petition is founded upon a flawed analysis that fails (1) to distinguish between speech cases

concerning the state's role as a sovereign and those in which the state acts in its role as an employer, and (2) to address the consequences of that distinction. The writ of certiorari should be denied.

C. WHEN ADDRESSING THE BALANCING OF THE PARTIES' COMPETING INTERESTS UNDER THE FIRST AMENDMENT, GANYO MISSTATES THE INTERESTS OF THE SCHOOL DISTRICT RESPONDENTS

The courts below balanced the parties' competing interests and granted summary judgment in favor of the School District Respondents on Ganyo's First Amendment speech claim:

> [Ganyo's] speech interests, including his "refusal to speak", are outweighed by the school district's interest in efficient education. Therefore, summary judgment should be granted as to [Ganyo's] free speech claims.

(Pet. App. at 23). The courts below did not misapply the balancing test. Ganyo's Petition simply attempts to misstate the interests of the School District Respondents that were weighed in the balance.

The test at issue involves the balance struck between a public employee's First Amendment speech interest and the government's interest "in promoting the efficiency of the public service it performs through its employees." *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1735. In *Pickering*, the Supreme Court issued a caveat to its decision: because of the "enormous variety of fact situations" the Court did "not deem it either appropriate or feasible to lay down a general standard" of the relevant

factors to balance in all First Amendment cases. *Id.*, 391 U.S. at 569, 88 S.Ct. at 1735.

Ganyo's Petition misstates the interests of the School District Respondents that were at stake when the courts below applied the First Amendment balancing test. Ganyo erroneously states that "Respondents' only assertion of 'disruption' resulting from Dr. Ganyo's refusal to sign the assurance was 'because without this assurance, TEA was threatening to sanction the school district.'" (Petition at 19).

When applying the balancing test to the summary judgment evidence, the Magistrate Judge detailed the disruption in the efficient educational operations of the School District that resulted from Ganyo's "speech":

> Here, [Ganyo's] refusal to provide any assurance that the IEPs would be carried out directly affected both his specific duties and the school district's mission in educating its students (Docket no. 67, Arnold affidavit, exh. A [R. at 314-15]; Witt affidavit, exh. B [R. at 316-20]; Lehman affidavit, exh. C [R. at 321-26]. Indeed, the school district was threatened with losing its accreditation from the state.

(Pet. App. at 21).

> [T]he context in which [Ganyo] made his expression (refusing to sign an assurance to the TEA) had a direct and substantial impact on the ability of the school district to carry out its educational mission. ...

> ... [Ganyo] ignores the TEA mandate that the SISD provide "documentation" and take "immediate" action to assure that the IEPs were being followed. (Docket no. 67, Lehman affidavit, exh. C, attachment 1). [R. at 324.] The assurance [Ganyo] refused to sign was intended to serve that purpose.

(Pet. App. at 22-23).

The affidavits and their attachments cited by the Magistrate Judge (as quoted above) detailed the following: (1) that TEA found, in response to Ganyo's complaint, that the "documentation indicates that [he] fails to implement the IEPs of his students" (R. at 318); (2) that "due to [Ganyo's] failure to implement the IEPs of [his] students, the district [was] in violation of the federal regulations," a violation deemed to be "serious" by TEA (R. at 319); (3) that TEA required the School District to submit documentation showing that it would take "immediate action to provide students the services outlined in their IEPs," (R. at 317); and (4) that "the urgency of a timely response to TEA and the possibility of sanctions against the District" were explained to Ganyo (R. at 317).

The summary judgment evidence cited by the Magistrate Judge further established the causal relationship between Ganyo's refusal to provide the requested assurance and the disruption to the efficient operations of the School District. Ganyo's refusal to provide the requested assurance disrupted and threatened the District's ability to comply with federal law and to provide appropriate education to his special education students. The School District was in violation of federal regulations "[d]ue to [Ganyo's] failure to implement the IEPs of [his] students." (R. at 453). The summary judgment evidence established that Ganyo's refusal to provide the requested

assurance disrupted and threatened the efficient operations of the District. "[I]t jeopardized the District's accreditation with TEA" (R. at 315). "[I]t threatened to have accreditation of [SISD's] education program suspended by TEA" (R. at 317). "[I]t required replacing Dr. Ganyo with a teacher who would perform his job duties to the satisfaction of TEA" (R. at 317). In order to ensure the educational integrity of its special education program, the District would have to "replace [Ganyo] with someone who would agree to teach school children as required by state law and enforced by TEA" during the middle of the school semester (R. at 322).

In essence, Ganyo's position is this: by *his* making a complaint that is based upon *his* inability to carry out *his* assigned duties, he becomes immune from termination by his employer, even though the agency to which he complained determined that his assignment was legal, reasonable, and manageable. It is a very clever job security strategy: (1) make a complaint that results in a requirement issued by a supervising agency that your employer take corrective action, corrective action that would involve your assuring the agency that you would do what you have been assigned to do and what your employer is paying you to do, (2) refuse to provide any such assurance, and (3) raise as your defense to termination the ramparts of the First Amendment.

Ganyo's position would virtually cripple a public employer's ability to terminate employees who do not do their jobs. All an employee would have to do to constitutionalize incompetence, inability, and/or lack of motivation would be to make a statement to someone in authority that he or she could not do the job, before adverse employment action is taken by the employer. Every attempt to terminate then would have a free speech element, and the interest of the public employer in promoting the efficiency of the public services it provides

through its employees would be effectively destroyed.

As observed by the Magistrate Judge, the facts of the present case are not analogous to *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987):

> All parties acknowledge that the direct reason for [Ganyo's] termination was his refusal to provide an assurance to the TEA that he would implement the student's IEPs. This does not present a situation, such as *Rankin*, where the speech is unrelated to the employee's work and does not interfere with the functioning of the office. ... Here, [Ganyo's] refusal to provide any assurance that the IEPs would be carried out directly affected both his specific duties and the school district's mission in educating its students.

(Emphasis added.)(Pet. App. at 20).

Ganyo does not dispute the finding of the Magistrate Judge that he "was free to continue to speak out regarding the appropriateness of his assignment" (Pet. App. at 22). Ganyo blatantly mischaracterizes the facts with his statement that the School District Respondents attempted to coerce a retraction of the complaints he had made to the Texas Education Agency (Petition at 17). The School District Respondents neither directed Ganyo to quit voicing his opinion nor demanded a surrender of any constitutionally protected opinions. Instead, they simply requested a reasonable assurance from Ganyo that he would do his job as assigned. Thus, Ganyo's situation cannot be compared to his hypothetical scenario of a teacher who is directed to give false testimony or be fired (Petition at 22). As the Magistrate Judge noted, under the logic of the so-called

right Ganyo seeks to enforce, "the ability of a school district to effectively carry out its educational mission would be divested."

Suppose, for example, that state law prohibits school districts from using corporal punishment to discipline students. Suppose further, that a district learns from an editorial that one of its teachers has had published in the local newspaper, that (1) the teacher has violated that law and administered corporal punishment at school, (2) he is adamant in his opinion that paddling students is an appropriate form of discipline, and (3) he asserts that discipline in the district (which has become a topic of public debate) cannot be maintained without corporal punishment. Could the district require the teacher to provide a written assurance that he would perform the required duties of his job and not paddle students in the future? Under Ganyo's erroneous rationale, even though the district does not attempt to restrict the teacher from speaking out about corporal punishment, if the teacher refuses to provide the requested assurance about performing his own job duties he could not be fired. Under Ganyo's view, he could not be fired because the district could not terminate his employment for refusing to provide the requested assurance.

For Ganyo even to attempt to analogize the present case to one in which "corrupt officials ... punish subordinates who blow the whistle" is scurrilous and wholly misleading to this Court (Petition at 20). The cases cited by Ganyo, of course, do not involve plaintiffs who blow the whistle on themselves (Petition at 20). Accepting Ganyo's argument would stand the very concept of whistleblowing on its head, giving protection to a person who commits a wrong because that very person blows the whistle on himself.

Ganyo's Petition misstates the interests of the School District Respondents that were at stake when the courts below

applied the First Amendment balancing test. The courts below correctly weighed the parties' interests when granting and affirming summary judgment against Ganyo on his First Amendment claim. The writ of certiorari should be denied.

D. WHEN ADDRESSING HIS CLAIM UNDER THE REHABILITATION ACT, GANYO FAILS TO ADDRESS THE ALTERNATIVE GROUNDS FOR THE LOWER COURTS' DISPOSITION OF THE CLAIM

To reiterate, Ganyo misrepresents the disposition of his cause of action under the Rehabilitation Act. Ganyo erroneously states that "the Court of Appeals left standing the Magistrate Judge's ruling that Dr. Ganyo has no standing to sue under the Rehabilitation Act because he himself is not disabled." (Petition at 6). To the contrary, the Fifth Circuit could have concluded that Ganyo presented "no reversible error" even if he had standing to sue, because summary judgment under the Rehabilitation Act was proper based upon one of the independent alternative grounds raised and argued by the School District Respondents.

In the district court, the School District Respondents asserted that Ganyo lacked standing to bring his claim under the Rehabilitation Act. The State Commissioner of Education previously had raised the same "lack of standing" issue in a Motion to Dismiss, and the Magistrate Judge already had ruled on that issue in a prior Memorandum and Recommendation (Pet. App. at 39-46). When that same issue then was raised by the School District Respondents, the Magistrate Judge in large part referred to his previous order on the Motion to Dismiss (Pet. App. at 14).

The Magistrate Judge articulated three independent reasons why Ganyo's claim under the Rehabilitation Act would fail. (1) First, Ganyo lacked standing. As the Magistrate Judge correctly observed, Ganyo sought "no relief from these [School District Respondents] that would benefit handicapped students in Seguin or otherwise further the interests the Rehabilitation Act was enacted to protect." (Pet. App. at 14; see also, Pet. App. at 39-43). (2) Second, even if Ganyo had third-party standing under the Act, "Ganyo's claim must fail." (Pet. App. at 43). In all of Ganyo's complaints, "he is complaining of actions taken against him, not against his handicapped or disabled students." (R. 210; RE Tab 7). (3) Third, the Magistrate Judge held that "assuming plaintiff does have standing to assert a Rehabilitation Act claim, the summary judgment evidence establishes, as a matter of law, that he was not terminated in retaliation for his complaint to the TEA." (Pet. App. at 27, n. 11).

Ganyo's brief in the Court of Appeals conceded that "Ganyo was expressly terminated for refusing to sign the assurance" (Brief of Appellant, p. 25). As the Magistrate Judge noted:

> All parties acknowledge that the direct reason for [Ganyo's] termination was his refusal to provide an assurance to the TEA that he would implement his students' IEPs.

(Pet App. at 20).

The summary judgment evidence established that the decision of the SISD school board members to terminate Ganyo's employment was based upon a finding of his refusal to follow administrative directives in providing the requested letter of assurance and was not based upon his complaints (R. at 327-

38). As the Magistrate Judge observed:

> The affidavits submitted by board members Fox, Ewald, Fennell, and Simicek indicate that the decision to terminate [Ganyo's] employment was based upon a finding of his refusal to follow administrative directives, and was not based upon his complaints or association (Docket no. 67, exhs. D-G). [R. at 327-38.] [Ganyo] has submitted no evidence that the school board members who voted for his termination were otherwise motivated.

(Pet. App. at 26).

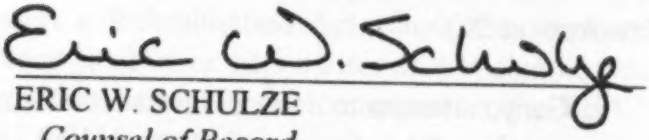
Ganyo attempts to mislead this Court with his erroneous statement that "the Court of Appeals left standing the Magistrate Judge's ruling that Dr. Ganyo has no standing to sue under the Rehabilitation Act because he himself is not disabled." (Petition at 6). The Court of Appeals could have found that Ganyo's claim under the Rehabilitation Act presented "no reversible error" on appeal for any of three independent reasons, all of which were established in the district court and raised and argued on appeal. The writ of certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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